IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 173 of 2001

For Approval and Signature:

HONOURABLE MR.JUSTICE J.M.PANCHAL
AND
HONOURABLE MR.JUSTICE H.B.ANTANI

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1 Whether Reporters of Local Papers may be allowed to see the judgment?

2 To be referred to the Reporter or not?

3 Whether their Lordships wish to see the fair copy of the judgment?

4 Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder?

5 Whether it is to be circulated to the Civil Judge?

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ASHOKKUMAR CHANDULAL JAPEE - Appellant
Versus
STATE OF GUJARAT - Opponent

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Appearance :
MR BS SUPEHIA for the Appellant.
MR KT DAVE, ADDITIONAL PUBLIC PROSECUTOR for the Opponent.

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CORAM : HONOURABLE MR.JUSTICE J.M.PANCHAL
and
HONOURABLE MR.JUSTICE H.B.ANTANI

Date : 12/12/2005

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE J.M.PANCHAL)

1. Instant appeal, filed under Section 374 (2) of the Code of Criminal Procedure, 1973, is directed against

judgment dated January 21, 2001, rendered by the learned Additional Sessions Judge, Court No. 8, City Sessions Court, Ahmedabad, in Sessions Court No. 201 of 2000, by which the appellant is convicted under Section 20(b)(i) and Section 21 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (“the Act”, for short) and sentenced to suffer RI for 3 years and fine of Rs. 21,000/- (Rupees Twenty-One Thousand Only), in default RI for 3 months, for commission of offence punishable under Section 20(b)(i) of the Act as well as RI for 11 years and fine of Rs. 1,00,000/- (Rupees One Lakh Only), in default RI for six months, for commission of offence punishable under Section 21 of the Act.

2. The facts emerging from the record of the case are as under:

On March 31, 2000, Mr. B. M. Rajvanshi was discharging duties as Police Inspector, State Narcotic Cell, CID Crime, State of Gujarat, Ahmedabad. When he was in his office, his informant informed him that a person, wearing grey coloured safari suit, having grey hair of medium built, whose name was Ashokkumar Chandulal Japee, was to come on foot from Motera Statidum towards Sabarmati *Tolnaka* with *charas* and *ganja* between 15-00

Hours and 16-00 Hours. On receipt of the information, PI Mr. Rajvanshi reduced the same into writing by making an entry in the Register maintained at the Police Station. He also forwarded his report to his immediate official superior i.e. Superintendent of Police, State Narcotic Cell and reported information received by him. In view of the information received by him, he decided to arrange a raid. He, therefore, asked Police Sub-Inspector Mr. U. M. Jadhav to requisition services of two *panch-witnesses*. PSI Mr. Jadhav summoned two *panch-witnesses*, namely: (i) Laxmanbhai Shankarlal Marathi and (ii) Sambubhai Bhagwanbhai Vaghela. On arrival of the above named *panch-witnesses*, PI Mr. Rajvanshi, ascertained from them whether they were willing to act as *panch-witnesses*. As the persons summoned expressed their willingness to act as *panch-witnesses*, the information received by PI Mr. Rajvanshi was conveyed to them. Necessary material needed for seizure and seal of substance, found if any, such as, scales and weights, kit-box for examining the substance, if found, wax, twine, seal, papers, pad, etc. were collected and first part of *panchnama* was prepared in the Police Station itself. Thereafter, PI Mr. Rajvanshi, in the company of his staff and *panch-witnesses,* proceeded in a Government jeep to the place which was indicated in the information received. The

Government vehicle was stopped near *Ashram* of *Asaram Bapu* and after alighting from the vehicle, a vigil was maintained. At about 15-15 Hours, a person, answering the description given in the information, was spotted. When he was passing near the main door of stadium, he was intercepted. PI Mr. Rajvanshi introduced himself to the person intercepted and interrogated him. On interrogation, he disclosed his name to be Ashokkumar Chandulal Jappi (the appellant). PI Mr. Rajvanshi informed the appellant that an information was received that he was in possession of *ganja* and *charas* and, therefore, it was necessary to search his person. Before effecting search, PI Mr. Rajvanshi offered the appellant to be searched in presence of a Magistrate or a Gazetted Officer, but the said offer was declined by the appellant. Thereupon, the black plastic-bag carried by the appellant was searched, which resulted into find of *ganja*, weighing about 286 Grams. After search of plastic-bag carried by the appellant was over, the clothes put on by the appellant were searched, which resulted into find of *charas* from one of the pockets of the pant put on by him. The weight of *charas* was ascertained to be 34 Grams. PI Mr. Rajvanshi called upon the appellant to produce pass or permit authorising him to possess *ganja* and *charas*, but none could be produced

by the appellant. Thereupon, two samples were drawn. From the quantity of 286 Grams of *ganja*, 50 Grams of *ganja* was drawn, which was placed in a plastic-bag. The plastic-bag was, thereafter, heat-sealed. The heat-sealed plastic-bag containing sample *ganja* was wrapped in a paper on which slips containing signatures of *panch-witnesses* were affixed. Thereafter, the paper packet was sealed, as required by law. Similarly, a sample of 10 Grams of *charas* was drawn and sealed, after which second part of *panchnama* was drawn. The appellant was communicated grounds of arrest and arrested. Thereafter, PI Mr. Rajvanshi lodged his complaint. PI Mr. Rajvanshi produced his complaint, *panchanama, muddamal* articles, etc. along with his forwarding letter addressed to the PSO. On the basis of the complaint of PI Mr. Rajvanshi, offences punishable under the Act were registered against the appellant. Further, investigation into the case was made by PSI Mr. Jassuba Bapusaheb Rana. He recorded statements of those persons who were found to be conversant with the facts of the case. The samples seized and sealed were sent to Forensic Science Laboratory for analysis. The report of the analysis indicated that the substances found from the possession of the appellant were *ganja* and *charas,* respectively, within the meaning of the Act. On completion of

investigation, the appellant was chargesheeted in the Court of learned Special Judge, City Sessions Court, Ahmedabad, on the basis of which Sessions Case No. 201 of 2000 was registered.

3. The learned Additional Sessions Judge, Ahmedabad, to whom the case was made over for trial, framed charge against the appellant at Exh. 1 for commission of offences punishable under Section 20(b) of the Act as well as Section 66(b) of the Bombay Prohibition Act, 1949. The charge was read over and explained to the appellant. He pleaded not guilty to the same and claimed to be tried. The prosecution, therefore, examined four witnesses to prove its case against the appellant i.e. (i) *panch* Laxman Shankarlal Marathi as PW 1, at Exh. 8; (ii) Police Inspector Bimal Motilal Rajvanshi as PW 2, at Exh. 10; (iii) Police Sub-Inspector Uttambhai Manilal Jadhav as PW 3, at Exh. 24; and, (iv) Investigating Officer Mr. Jasubha Bapusaheb Rana as PW 4, at Exh. 25. The prosecution also produced documentary evidence, such as: *panchnama* of search and recovery of *ganja* as well as search of person of the appellant and find of *charas* from one of the pockets of his pant, at Exh. 9; entry indicating that information received by PI Mr. Rajvanshi was reduced into writing, as

required by Section 42(1) of the Act, at Exh. 11; report under Section 42(2) by PI Mr. Rajvanshi to Superintendent of Police, Gujarat State Narcotic Cell, Ahmedabad, at Exh. 12; resolution indicating that provisions of Section 50 of the Act were complied with, at Exh. 13; copy of seizure memo served on the appellant, at Exh. 14; memo indicating that grounds of arrest were communicated to the appellant, at Exh. 16; complaint of PI Mr. Rajvanshi, at Exh. 17; report with which *panchnama*, samples, etc. were handed by PI Mr. Rajvanshi to PSI Mr. Jadhav, at Exh. 21; report made by PI Mr. Rajvanshi to his immediate official superior, as required by Section 57 of the Act, at Exh. 22; report of analysis, at Exh. 27; botanical examination of substances found from possession of the appellant, at Exh. 28, etc. in support of its case against the appellant.

4. After recording of evidence of prosecution witnesses was over, the learned Judge of the Trial Court explained to the appellant the circumstances appearing against him in the evidence of the prosecution witnesses and recorded his further statement, as required by Section 313 of the Code of Criminal Procedure. The appellant, in his further statement, claimed that he was a *pujari* of a temple and a false case was foisted upon

him. However, no defence evidence was led by him to substantiate the claim advanced by him in his further statement.

5. On appreciation of evidence adduced by the prosecution, the learned Judge held that it was proved by the prosecution beyond reasonable doubt that on March 31, 2000, the appellant was found in possession of 34 Grams of *charas* and 286 Grams of *ganja* near main gate of Motera Stadium without pass or permit and, therefore, he was liable to be convicted for commission of offence punishable under Section 20(b) of the Act. Though the learned Judge has not given any specific finding that substances or any of the substances found from possession of the appellant was manufactured drug within the meaning of the Act, the learned Judge came to the conclusion that provisions of Section 21 of the Act were also attracted to the facts of the case, but charge under Section 21 of the Act was not framed against the appellant which was not fatal, as the appellant had not suffered prejudice at all and, therefore, the appellant was liable to be convicted for commission of offence punishable under Section 21 of the Act also. The learned Judge noticed that *muddamals* were sealed properly and were sent to the Forensic Science Laboratory for analysis intact which

ruled out possibility of samples being tampered with. In view of abovereferredto conclusions, the learned Judge has convicted the appellant under Section 20(b) and Section 21 of the Act and imposed sentences referred to earlier by judgment dated January 21, 2001, giving rise to instant appeal. It may be stated that the learned Judge of the Trial Court has directed that the sentences imposed on the appellant for commission of offences punishable under Section 20 (b) and 21 of the Act shall run consecutively and not concurrently.

6. Mr. B. S. Supehia, learned Counsel of the appellant, contended that no reliable evidence is adduced by the prosecution to establish that provisions of Section 42 of the Act were complied with and, therefore, the appellant should be acquitted. It was argued that it is not established by PI Mr. Rajvanshi that before effecting search of plastic-bag carried by the appellant and / or search of person of the appellant, provisions of Section 50 of the Act were complied with and, therefore, also, the impugned judgment should be set aside. According to the learned Counsel, the evidence regarding compliance of provisions of Section 57 of the Act is not satisfactory and, therefore, the impugned judgment is liable to be reversed. In the alternative, it was argued

that it is not established by the prosecution that the substance / substances seized is / are manufactured drug(s) within the meaning of the Act and, therefore, the learned Judge of the Trial Court was not justified in convicting the appellant under Section 21 of the Act. According to the learned Counsel of the appellant, the appellant was found in possession of *ganja* which is punishable under Section 20(b)(i) of the Act whereas the appellant was found in possession of *charas* for which he is liable to be punished under Section 20(b)(ii) of the Act and, therefore, unwarranted conviction of the appellant under Section 21 of the Act should be set aside. It was argued that the learned Judge of the Trial Court was not justified in imposing punishment of 11 years and fine of Rs. 1,00,000/- (Rupees One Lakh Only) for commission of offence punishable under Section 21 of the Act and after converting the said conviction into one punishable under Section 20(b)(ii) of the Act, the appellant should be punished to minimum punishment prescribed i.e. RI for 10 years and fine of Rs. 1,00,000/- (Rupees One Lakh Only), in default RI for 6 months, for commission of offence punishable under Section 20(b)(ii) of the Act. The learned Counsel emphasised no grounds existed whatsoever to direct that the sentences imposed on the appellant should run

consecutively and, therefore, the said direction should be set aside by directing that the punishments imposed on the appellant shall run concurrently.

7. Mr. K. T. Dave, learned Additional Public Prosecutor for the State, argued that PI Mr. Rajvanshi is a Gazetted Officer, who is an Empowered Officer under sub-section (2) of Section 41 of the Act and, therefore, it was not necessary for him to comply with the provisions of sub-section (2) of Section 42 of the Act. The learned Counsel argued that as PI Mr. Rajvanshi had reduced into writing the information received by him, no benefit can be given to the appellant on the ground that provisions of sub-section (2) of Section 42 of the Act were not complied with. In the alternative, it was argued that the evidence of PI Mr. Rajvanshi, read with relevant documents produced on the record, establishes beyond reasonable doubt that report, as contemplated by sub-section (2) of Section 42 of the Act, was forwarded by him to his immediate official superior and it is not correct to argue that provisions of Section 42 were not complied with. It was emphasised by the learned Counsel of the State that before effecting search of plastic-bag carried by the appellant, the appellant was offered to be searched in presence of a Gazetted Officer or a

Magistrate, but the said offer was declined by the appellant and, therefore, it is wrong to contend that mandatory provisions of Section 50 of the Act were not complied with. The learned Counsel of the State Government drew attention of the Court to the contents of document produced at Exh. 22 to contend that provisions of Section 57 of the Act were also complied with by PI Mr. Rajvanshi. The learned Counsel fairly submitted that it is difficult for him to defend the finding recorded by the learned Judge of the Trial Court that provisions of Section 21 of the Act were attracted to the facts of the present case and pleaded that the conviction of the appellant under Section 21 of the Act should be converted into one punishable under Section 20(b)(ii) of the Act, for which minimum punishment prescribed by law should be imposed on him. The learned Counsel of the State Government claimed that cogent and convincing reasons have been assigned by the learned Judge of the Trial Court for convicting the appellant under the provisions of the Act, and as the learned Counsel of the appellant has failed to dislodge those weighty reasons, the appeal, which lacks merits, should be dismissed.

8. This Court has heard Mr. B. S. Supehia, learned Counsel of the appellant and Mr. K. T. Dave, learned

Additional Public Prosecutor for the State, at length and in great detail. This Court has also undertaken a complete and comprehensive appreciation of all vital features of the case as well as the entire evidence on record with reference to broad and reasonable probabilities of the case.

9.1 The find of *ganja* from plastic-bag carried by the appellant as well as *charas* from one of the pockets of pant put on by the appellant is not in dispute. The said fact amply stands proved by the reliable testimony of PI Mr. Rajvanshi, which is recorded at Exh. 10. PI Mr. Rajvanshi stands fully corroborated by the testimony of PSI Mr. Uttam Manilal Jadav, whose testimony is recorded at Exh. 24. PI Mr. Rajvanshi further stands corroborated by contemporary document on record, namely, *panchnama* prepared at the time of search and seizure of the person of the appellant. It is not argued by the learned Counsel of the appellant that the finding recorded by the learned Judge of the Trial Court that the appellant was found in possession of *ganja* and *charas* on March 31, 2000 without pass or permit is against the weight of evidence on record or erroneous and, therefore, liable to be set aside. The said finding is based on acceptable and reliable evidence. Therefore, the said

finding is hereby affirmed.

9.2 The plea, that provisions of Section 42(2) of the Act are not complied with and, therefore, the impugned judgment should be set aside, is devoid of merits. It may be stated that PI Mr. Bimal M. Rajvanshi is a Gazetted Officer. He is also an Empowered Officer within the meaning of the sub-section (2) of Section 41 of the Act in view of the Notification No. GH-L.14-NDS-1087(i)-M dated 15th June, 1987 issued by Government of Gujarat in exercise of its powers conferred by sub-section (2) of Section 41 of the Act. Therefore, he was required to comply with provisions of sub-section (2) of Section 41 and not the provisions of Section 42. Sub-section (2) of Section 41 *inter alia* provides that when a Gazetted Officer, who is also an Empowered Officer, receives information, he must reduce the information into writing. The testimony of PI Mr. Rajvanshi establishes that he had reduced the information received by him into writing. In support of this assertion, he has produced extract of entry at Exh. 11. Thus, there is no manner of doubt that the provisions of sub-section (2) of Section 41 were fully complied with by PI Mr. Rajvanshi.

9.3 Even if it is held that provisions of Section 42

are applicable to the facts of case on hand, this Court finds that PI Mr. Rajvanshi had reduced information received by him into writing, which is quite evident from contents of entry produced by the prosecution at Exh. 11. The record further shows that after the information was reduced into writing, PI Mr. Rajvanshi had forwarded his report to Superintendent of Police, State Narcotic Cell, Gujarat State, Ahmedabad, who is his immediate official superior. The report is produced by the prosecution at Exh. 12. It means that the provisions of Section 42(2) were also complied with by PI Mr. Rajvanshi. Under the circumstances, no benefit can be given to the appellant on the basis that mandatory provisions of Section 42 were not complied with by PI Mr. Rajvanshi.

9.4 The plea, that provisions of Section 50 of the Act were not complied with and, therefore, the judgment impugned in the appeal should be set aside, is merely stated to be rejected. PI Mr. Rajvanshi has categorically asserted in his testimony before the Court that before effecting search of person of the appellant, the appellant was offered to be searched in presence of a Magistrate or a Gazetted Officer and that the said offer was declined by the appellant. Though PI Mr. Rajvanshi is cross-examined at length, nothing could be brought on

record to make a dent in his assertion that offer, as contemplated by Section 50 of the Act, was made by him before effecting search of person of the appellant. PI Mr. Rajvanshi stands corroborated by PSI Mr. Jadhav, whose testimony is recorded at Exh. 24. PSI Mr. Jadhav also says that before effecting search of the person of the appellant, PI Mr. Rajvanshi had offered him to be searched in presence of a Magistrate or a Gazetted Officer, but the said offer was declined by the appellant. Further, the fact that offer, as contemplated by Section 50 of the Act, was made by PI Mr. Rajvanshi before effecting search of his person stands amply proved by document, which is produced by the prosecution on record of the case at Exh. 13. Exh. 13 shows that the provisions of Section 50 were fully complied with by PI Mr. Rajvanshi. The fact that offer, as contemplated by Section 50 of the Act, was made by PI Mr. Rajvanshi to the appellant is also reflected in *panchnama* of seizure of offending articles as well as complaint lodged against the appellant. On reappreciation of evidence on record, this Court finds that the prosecution has satisfactorily established that provisions of Section 50 of the Act were complied with by PI Mr. Rajvanshi before effecting search of the person of the appellant and, therefore, no benefit can be given on the specious plea that mandatory

provisions of Section 50 of the Act were not complied with by PI Mr. Rajvanshi.

9.5 The plea, that provisions of Section 57 of the Act were not complied with, is also merely stated to be rejected. Section 57 *inter alia* requires that after the raid is over, the same should be reported to immediate official superior by the raiding officer. In this case, such report was forwarded by PI Mr. Rajvanshi to his immediate official superior, which is evident from contents of report produced by the prosecution at Exh. 22. Thus, it is wrong to contend that provisions of Section 57 were not complied with.

9.6 This brings the Court to consider the question whether conviction of the appellant under Section 21 of the Act is justified. It may be stated that no charge was framed against the appellant for commission of offence punishable under Section 21 of the Act. As noted earlier, the offending substances were sent to Forensic Science Laboratory for analysis. The report of the analysis does not indicate that the substances analysed were manufactured drugs within the meaning of Section 2(xi) of the Act. It is not argued by Mr. K. T. Dave, learned Additional Public Prosecutor for the State,

before this Court that any of the substances found from possession of the appellant was manufactured drug. Therefore, this Court fails to understand as to why the learned Judge has convicted the appellant under Section 21 of the Act. The conviction of the appellant under Section 21 of the Act is not sustainable in law at all and is, therefore, liable to be set aside. The proper conviction, which should have been recorded by the learned Judge, should have been one punishable under Section 20(b)(i) of the Act for possession of *ganja* without pass or permit and under Section 20(b)(ii) for possession of *charas* without pass or permit. Further, the record does not indicate that the appellant is habitual offender or part of a systematic gang operating in narcotic drugs. Therefore, the Trial Court was not justified in imposing more punishment than minimum prescribed under the law and nor the Trial Court was justified in directing that the substantive sentences imposed on him shall run consecutively. Thus, on the point of sentence, the appeal deserves to be allowed partly.

10. For the foregoing reasons, the appeal partly succeeds. The conviction of the appellant, under Section 20(b)(i) of the Act and imposition of sentence of RI for

3 years and fine of Rs. 21,000/- (Rupees Twenty-One Thousand Only), in default RI for 3 months, as he was found in possession of *ganja* without pass or permit, *vide* judgment dated January 21, 2001 rendered by the learned Additional Sessions Judge, Court No. 8, City Civil and Sessions Court, Ahmedabad in Sessions Case No. 201 of 2000, is hereby upheld. Further, his conviction, recorded by abovereferredto judgment under Section 21 of the Act, 1985, is hereby set aside. Instead, the appellant is convicted for commission of offence punishable under Section 20(b)(ii) of the Act, as he was also found in possession of *charas* without pass or permit, and imposed sentence of RI for 10 years and fine of Rs. 1,00,000/- (Rupees One Lakh Only), in default RI for 6 months. The direction, given by the learned Judge of the Trial Court that substantive sentences shall run consecutively, is hereby set aside. It is directed that the appellant shall undergo substantive sentences imposed on him concurrently and shall also be entitled to benefit of set off. Appeal is allowed partly to the extent indicated hereinabove. M*uddamal* be disposed of in terms of the directions issued by the learned Judge of the Trial Court in the impugned judgment.

[J. M. PANCHAL, J.]

[H. B. ANTANI, J.]

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